IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 133/2005

Smt. Abdolonia Diniz e Almeida
alias Lony Almeida. ..... Appellant.

V/s.

Smt. Marcelina Almeida alias
Marcia Almeida and others. ..... Respondents.

Mr. Valmiki Menezes, Advocate for the appellant.

Mr. C. A. Coutinho, Advocate for the respondents.

CORAM : D.D. SINHA, J.

DATE : 8TH DECEMBER, 2005.

P.C.

Heard Mr. Menezes, the learned Counsel for the appellant and Mr. Coutinho, the learned Counsel for the respondents. The appellant is the original defendant. The suit was filed by the the respondent/unoriginal plaintiff for declaration and injunction as well as for correction of survey records. The suit was decreed. Being aggrieved, the appellant/original defendant filed a first appeal which also came to be dismissed and, therefore, the present second appeal.

2. The Counsel for the appellant raised the following

substantial question of law :

> "In the light of the pleadings in para 4 of the written statement that in Regular Civil Suit No.60/83/D between the appellant and respondents, the respondents had admitted that the property "Porbuna Segunda Adicao" was surveyed only under Nos. 634/20, 634/22 and 634/24, whether the Courts below were required to frame an issue as to whether the Plaintiffs were estopped from claiming a larger area in the present suit ?

2. The learned Counsel for the appellant contended that the respondents /original plaintiffs filed the Regular Civil Suit No.60/83/D against the appellant for recovery of possession and for injunctions in respect of Survey No. 634/24. In the evidence adduced by the plaintiffs, the plaintiff has deposed that she and her daughter was the owner of the property known as "Porbuna Segunda Adicao" situated at Adiband having survey Nos. 634/20, 634/22 and 634/24. It was also deposed by the plaintiff that the said property was purchased by her husband Magno Almeida in the year 1946. The learned Counsel for the appellant contended that if the property "Porbuna Segunda Adicao" consisted of only three survey numbers as deposed by the plaintiff in the earlier suit, the respondents/plaintiffs are estopped from seeking declaration in respect of the additional survey Nos. 634/25, 634/19 and 634/16. The learned Counsel further contended

that in view of the above referred admitted position, grant of permission to amend the plaint whereby the plaintiffs claim declaration in respect of the additional survey numbers, as referred to hereinabove, was not permissible and the claim made by the plaintiffs was impermissible and therefore the declaration sought in respect of the said additional survey numbers was also not sustainable in law. It is, therefore, contended that the Judgment and Decree passed by the Courts below is not sustainable in law in view of the above referred substantial question of law.

3. The leaned Counsel for the respondents, on the other hand, submitted that earlier the suit bearing Regular Civil Suit No.60/1983/D was filed against the present appellant for injunction simpliciter in respect of the property bearing Survey No. 634/24 known as “Porbuna Segunda Adicao” since the appellants (the defendants in the suit) were trying to disturb the possession. It is further contended that it is no doubt true that in the evidence other survey numbers of the property “Porbuna Segunda Adicao” were referred. However, the suit property was restricted only to survey No.634/24 and, therefore, mere description of other survey numbers does not prohibit the respondents/plaintiffs from filing the suit for declaration and injunction. However, the plaintiffs were required to adduce cogent and independent evidence to prove the title in respect of which declaration is sought in the suit. It is further contended that in so far

as this aspect is concerned, there was no issue framed by the trial Court nor there was any grievance made by the appellant about nonframing of proper issues for determination by the trial Court. It is, therefore, contended that the Judgments and Decrees passed by the Courts below are sustainable in law.

4. I have considered the contentions canvassed by the learned respective Counsel. It is no doubt true that the respondents who had filed the earlier suit being Regular Civil Suit No.60/83/D had deposed that the property known as “Porbuna Segunda Adicao” was consisting of survey Nos. 634/20, 634/22 and 634/24, which was purchased by the husband of the respondent in the year 1946. However, we cannot close our eyes to the fact that the suit was only for grant of injunction in respect of Survey No. 634/24. Similarly, the issue framed in the said suit would also demonstrate the rival claims of the parties. Issue No.1 framed in the said suit reads thus :

> “Whether the plaintiffs prove that they are the owners of the suit property and that the same was enjoyed by Magno Almeida and thereafter by the plaintiffs ?”

For the present, we are not concerned with the other issues framed in the said suit since the property involved in the said suit was only in respect of survey No. 634/24. There was no occasion for the Court to consider the evidence in respect of other properties other than the

one claimed in the said suit i.e. Survey No. 634/24.

5. The regular Civil Suit No.60/1983/D was decreed by the trial Court. It is no doubt true that in the deposition of the plaintiff in the earlier suit, referred to hereinabove, there is mention about the survey numbers of the property known as “Porbuna Segunda Adicao”. However, on the basis of the said description, it is very difficult to conclusively hold that the property known as “Porbuna Segunda Adicao” was consisting of only survey Nos. 634/20, 634/22 and 634/24, since there was no issue framed in the said suit nor there was any occasion for the parties to adduce evidence in the said suit in this regard and, therefore, there is no finding recorded by the trial Court in the said suit on this aspect which is decreed on 28.6.1988.

6. Similarly, the respondents/plaintiffs filed the Regular Civil Suit No.143/89 for declaration and injunction in respect of survey Nos. 634/20, 634/22 and 634/24 which are shown to be the part and parcel of the property known as “Porbuna Segunda Adicao”. At the later point of time, it appears that the respondents moved an application seeking permission to amend the plaint in order to include survey Nos. 634/25, 634/19 and 634/16 as part and parcel of the property “Porbuna Segunda Adicao” and also was claiming the title in respect of the property shown in these survey numbers. It is not in dispute that the application moved by the respondents seeking permission to

amend the plaint was allowed by the trial Court and thereafter, the the said property became the part and parcel of the pleadings of the plaint. The appellant did not challenge the order granting the amendment before the superior Court and, therefore, the permission granted by the trial Court to amend the plaint reached finality. Secondly, mere general description of the property “Porbuna Segunda Adicao” given in the evidence by the plaintiffs in the earlier suit, in my view, would neither prohibit the respondents from filing the suit for title nor the respondents/plaintiffs are estopped from claiming the title in respect of those survey numbers. However, it is for the plaintiffs to prove by adducing cogent and independent evidence to prove their title in respect of the suit property mentioned in the suit.

7. In view of all these aspects, the substantial question of law raised by the appellant referred to hereinabove is not a substantial question which would not arise for consideration of this Court in this appeal. In the circumstances, the second appeal suffers from merits and the same is, hereby, dismissed.

D.D.SINHA, J.

ssm.